as solemnly consecrated to God and religion. A sentiment of reverence towards the graves of companions and ancestors would certainly go far towards impelling the courts in this country to hold that a churchyard, used as a cemetery, is not subject to execution." And in the case of *Arbuckle* v. *Cowtar*, 3 Bos. & Pul. 328, Lord ALVANLEY said: "We have, therefore, complete authority for saying that at common law, no process ever issued to a sheriff to levy on ecclesiastical property the debt due in an action."

In the case of *Brown* v. *Lutheran Church, &c.*, 23 Penn. St. 495, it was said: The sentiment is sound and has the sanction of mankind in all ages, which regards the resting-place of the dead as hallowed ground, not subject to the laws of ordinary property, nor liable to be devoted to common uses."

As was said by the vice-chancellor in *Windt* v. *The German Reformed Church*, in speaking of the protection afforded the remains of the dead when it became necessary to remove them, so may it be confidently asserted of their last resting-places, namely, that their protection depends not alone upon public laws of a restraining character, but "in a still stronger public opinion."

WM. C. SCHLEY.

Baltimore, Md.

## RECENT ENGLISH DECISIONS.

*High Court of Justice. Probate Division.*

SOTTOMAYOR (OTHERWISE DE BARROS) *v.* DE BARROS (THE QUEEN'S PROCTOR INTERVENING).

The validity of a marriage, as of any other contract, is to be determined, as a general rule, by the *lex loci contractus.*

The dictum in *Sottomayor* v. *DeBarros*, Law Rep. 3 Prob. Div. 5, that the question of personal capacity to enter into any contract, is to be decided by the law of the domicile, dissented from.

A marriage took place in England, between a man domiciled there and a woman domiciled in Portugal. By the laws of Portugal, the marriage would have been void for consanguinity. *Held*, that the marriage was governed by the law of England and was valid.

Marriage is founded upon contract but is something more. It is a *status*, the conditions of which are prescribed by each state for itself, and must be determined by the law of such state.

THIS was a petition to declare a marriage void. It had been twice previously before the courts, and the facts and the history of the case are sufficiently set out in the opinion.

Sir JAMES HANNEN, President.—In this suit the petitioner prayed that her marriage with the respondent might be declared null and void. The petition set forth that she and the respondent were natives of Portugal, and at the time of the marriage domiciled in Portugal; that they were natural and lawful first cousins; and that according to the law of Portugal first cousins are incapable of contracting marriage, on the ground of consanguinity. The respondent entered an appearance, but did not file an answer. The case came on before Sir R. PHILLIMORE, who directed that the papers should be sent to the Queen's proctor, in order that he might, under the direction of the attorney-general, instruct counsel to argue the question whether the petitioner had shown a sufficient ground for a decree of nullity; first, by reason of the incapacity of the parties to contract marriage in 1866; secondly, by reason of fraud; and thirdly, by reason of the petitioner's want of intention to contract a marriage, and of her ignorance of the effect of the ceremony. On the 7th November 1876, the Queen's proctor obtained leave to intervene in the case and filed pleas. On 20th January 1877, it was ordered by consent of the parties that the questions of law referred to the Queen's proctor for argument be heard before the questions of fact, without prejudice to either party. The case, accordingly, came on for argument on 17th March 1877, before Sir R. PHILLIMORE, who stated that he was satisfied that the petitioner perfectly understood she was about to contract a marriage, and that it could not vitiate the marriage that she had an erroneous view of its future consequences, and refused to set it aside, on the ground of incapacity of age, or collusion, or fraud, and further, held that the marriage, having been contracted in England and being valid by English law, could not be declared null, on the ground that the parties were incapacitated from entering into it by the law of Portugal: Law Rep. 2 Prob. Div. 81. On appeal this judgment was reversed: Law Rep. 3 Prob. Div. 1. The case was accordingly remitted to this division inorder that the questions of fact raised by the Queen's proctor's pleas should be determined. These pleas alleged: firstly, collusion; secondly, that the petitioner and respondent were lawfully married; thirdly, that said marriage was not procured by fraud; fourthly, that the petitoner intended to, and did, contract a lawful marriage, and was not ignorant of the effect thereof; fifthly, that the petitioner and respondent cohabited as man and wife; sixthly, that the petitioner

and respondent, at the time of the marriage, were domiciled in England. It was objected on behalf of the petitioner that the Queen's proctor was not entitled to intervene on any ground but that of collusion.

This depends upon the construction to be put upon 23 & 24 Vict. c. 144, s. 17, by which it is enacted that during the period between the decree *nisi* and the decree absolute, "any person shall be at liberty * * * to show cause why the decree *nisi* should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court." This part of the section does not apply, because no decree *nisi* has been pronounced; but the section proceeds, "and at any time during the progress of the cause, or before the decree is made absolute, any person may give information to the Queen's proctor of any matter material to the due decision of the cause, who may thereupon take such steps as the attorney-general may deem necessary; and if, from any information or otherwise, the Queen's proctor shall suspect that any parties to the suit are, or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the attorney-general, and by the leave of the court, intervene in the suit, alleging such a case of collusion and retain counsel and subpœna witnesses to prove it." In this case information was given to the Queen's proctor of matter material to the due decision of the case, among other things that facts tending to show that the parties at the time of the marriage were not domiciled in Portugal, but in England, which were not brought before the court, could be proved, and he thereupon took the directions of the attorney-general on the subject, and, suspecting that the parties were acting in collusion, he, under the direction of the attorney-general, and by leave of the court intervened in the suit. He having so done, the question is whether he may plead anything besides collusion. This question was decided in the affirmative by Lord PENZANCE, in the case of *Dering* v. *Dering*, Law Rep. 1 P. & D. 591.

There the intervention was after decree *nisi;* but in the case of *Drummond* v. *Drummond*, 2 Sw. & Tr. 269, the same question had arisen before the decree *nisi*, and Sir C. CRESSWELL held that the Queen's proctor was entitled to plead other pleas beside collusion, and the same course was allowed in *Boardman* v. *Boardman*, Law Rep. 1 P. & D. 233. I therefore hold that the Queen's proctor

is entitled to set up other defences in addition to that of collusion, and I proceed to give my findings on the several issues raised by the Queen's proctor's pleadings. The first of these is whether the petitioner and respondent are guilty of collusion. I am of opinion that that charge is not established. The second is whether the parties were lawfully married. It was not disputed that a ceremony of marriage was gone through which was valid according to the law of England; whether it was valid according to the law of Portugal, and the effect of its invalidity by that law, will be considered hereafter.

The third issue is whether the marriage was procured by fraud. Fourthly, whether the petitioner intended to contract a lawful marriage or was ignorant of any fact, the knowledge of which could be material to the constitution of a valid marriage. On this subject I may refer to the evidence of Mr. Miller, a solicitor, who was consulted by the father of the respondent with regard to the marriage before its celebration, and who says that, being struck with the youth of the parties, he saw them on the subject, both separately and together, and that he ascertained that they both wished it. That they were ignorant of the effect of the Portuguese law on the ceremony is most probable; but this ignorance cannot affect the validity of the marriage. The fifth issue is whether or not the petitioner and respondent cohabited as husband and wife. I do not give any opinion on this subject, as I consider it unimportant for the purpose of this cause. The sixth issue is the important one, on which the arguments have chiefly turned, namely, whether or not the petitioner and respondent, or either of them, were or was at the time of the marriage domiciled in England. With regard to the petitioner, as she was a minor at the time of the marriage, her domicile was that of her father. His domicile was Portuguese down to the time of his coming to England in 1858, and I am not satisfied that he had at that time, or at any time afterwards, mental capacity to change his domicile. I therefore find that the domicile of the petitioner at the time of the marriage was Portuguese. With regard to the respondent, he also was a minor, and his domicile was, therefore, the same as his father's. This person formerly carried on the business of wine-grower and exporter in Portugal. In 1858 he came to England, bringing with him the whole of his family. Here he set up in business as a wine merchant and importer. In 1860 he took a lease of a house in Dorset Square for twenty-one years. On 31st July 1861 an agree-

ment was entered into for the formation of a partnership for twenty years between the brother of Gonzalo De Barros and his sister and sister-in law, as wine importers and merchants, under the style of Caldos Brothers, of which partnership Gonzalo was to be manager at a salary of 500*l.* per annum, with the option of becoming a partner. The business was to be and was carried on at 9 Catharine court, St. Swithin's lane. The firm of Caldos Brothers failed in 1865; but Gonzalo De Barros continued to reside in London, and his son, the respondent, being still a minor, set up in the wine business. It is said by one of the witnesses that Gonzalo De Barros lived privately in London at the time, but it is probable that the business of the son was regarded as the business of both. In 1868, in the course of some legal proceedings, which were instituted in Portugal, Gonzalo De Barros informed his solicitor that his domicile was English, and instructed him to collect evidence in support of this assertion, which was done. In 1870, Gonzalo De Barros died in London, never having quitted London since his coming there in 1858. Evidence was given that he frequently said during this period that he meant to remain in England; and on the other hand, the only evidence besides that of the petitioner and her mother, offered to rebut the inference to be drawn from the facts above stated was that of one witness that he frequently said he should return to Portugal "as soon as his affairs were settled." It is evident, however, that this is not the language of a man who has become the manager of a business at a salary of 500*l.* a year. And even assuming the correctness of the witness's memory, such declarations cannot outweigh the evidence of the facts above stated: *Doucet* v. *Geoghegan*, Law Rep. 9 Ch. Div. 441. From these facts I draw the inference that the father of the respondent at the time he became the manager of the wine business had adopted England as his place of permanent residence, with the intention of remaining there for an unlimited time—in other words, that he became domiciled here. It follows, therefore, that the respondent's domicile was English also. There is abundant evidence that the respondent himself, after he came of age, continued to look upon England as the place of his domicile, and this may perhaps have some effect in considering what place his father had chosen as his domicile; but as the time of the marriage is the important point in the case, I do not think it necessary to dwell on the evidence of the respondent's subsequent intentions. The question then remains, what is the law

applicable to such a case? It is clear that the judgment which has been already given by the Court of Appeal is not applicable to such a state of facts. The language of the Court of Appeal is explicit. "It was pressed upon us in argument that a decision in favor of the petitioner would lead to many difficulties if questions should arise as to the validity of a marriage between an English subject and a foreigner in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are at the time of their marriage domiciled in a country, the law of which prohibits their marriage."

This passage leaves me free to consider whether the marriage of a domiciled Englishman in England with a woman, subject, by the law of her domicile, to a personal incapacity not recognised by English law, must be declared invalid by the tribunals of this country? Before entering upon this inquiry, I would observe that the Lords Justices appear to have laid down as a principle of law a proposition which was much wider in its terms than was necessary for the determination of the case before them. It is thus expressed: "It is a well-recognised principle of law, that the question of personal incapacity to enter into any contract is to be decided by the law of domicile." And again: "As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile." It is of course competent for the Court of Appeal to lay down a principle which, if it forms the basis of the judgment of that court, must, unless it be disclaimed by the House of Lords, be binding on all future cases. But I trust I may be permitted, without disrespect, to say that the principle thus laid down has not hitherto been "well recognised." On the contrary, it appears to me to be a novel principle for which, up to the present time, there has been no English authority. What authority there is, seems to be distinctly the other way. This is the case of *Meade* v. *Roberts*, 3 Exch. 183. The contract on which defendant was sued was made in Scotland. The defence was that the defendant was an infant; but Lord ELDON held the defence bad, saying: "If the law of Scotland is that such a contract as the present could not be enforced against an infant, it should have been given in evidence. The law of the country where the contract arose must govern the contract." Sir E. SIMPSON, in the case of *Scrimshire* v. *Scrimshire*, 2 Cons. 395, when dealing with the subject, says: "These authorities fully show that all con-

tracts are to be considered according to the laws of the country where they are made, and the practice of civilized countries has been conformable to this doctrine, and by the common consent of nations has been so received."

This is the view of the subject which is expressed by Burge, vol. 1, § 4, 132, and by Story, Confl. of Laws, § 103; and Sir C. CRESSWELL, in *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, says: "In contracts the personal competency of individuals to contract has been held to depend on the law of the place where the contract was made."

If the English reports do not furnish more authority on the point, it may, as Mr. Westlake has said, in his work on Private International Law, be referred to its not having been questioned. In the American reports the authorities are numerous, and uniformly support Sir C. CRESSWELL'S statement of the law which I have quoted. I cannot but think, therefore, that the learned Lords Justices would not desire to base their judgment on so wide a proposition as that which they have laid down with reference to the personal capacity to enter into all contracts. In truth, very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is indeed based upon the contract of the parties, but it is a *status* arising out of contract to which each country is entitled to attach its own conditions, both as to creation and duration. In some countries no other condition is imposed than that the parties, being of a certain age and not related within certain specified degrees, shall have contracted with each other to become man and wife; but that in those countries marriage is not regarded merely as a contract, is clear, since the parties are not at liberty to rescind it. In some countries, certain civil formalities are prescribed; in others a religious sanction is required. If the subject be regarded from this point of view, the effect of the recent decision of the Court of Appeal has only been to define a further condition imposed by English law, namely, that the parties do not both belong by domicile to a country the laws of which prohibit their marriage. But, as I have already pointed out, that judgment expressly leaves altogether untouched the case of a marriage of a British subject in England, where the marriage is lawful, with a person domiciled in a country where the marriage is prohibited. With regard to such a marriage, all the arguments which have hitherto been urged in support of the larger proposition, that a marriage

good by the law of the country where solemnized, must be deemed by the tribunals of that country to be valid, irrespective of the law of the domicile of the parties, remain with undiminished effect. They cannot be stated with greater accuracy and force than by Sir C. CRESSWELL, in *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, and as I could not express myself so well, I shall adopt the language of that learned judge as my own, without introducing the qualification which the decision of the Court of Appeal has created. The Court of Appeal has distinguished the present case from that of *Simonin* v. *Mallac*, on the ground that there the incapacity arose from the want of consent of parents, and that "the consent of parents required by the law of France must be considered a part of the ceremony of marriage." Certainly Sir C. CRESSWELL did not base his judgment on that ground. After observing that a distinction might be drawn between an absolute and conditional prohibition, he proceeds: "But taking the decree of the French court in the suit there instituted as evidence that by the law of France this marriage was void, we again come to the broad question, is it to be judged of here by the law of England or the law of France? In general, the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such a rule does not extend to contracts of marriage, and that parties are, with reference to them, bound by the law of their domicile."

Then, after reviewing the authorities, he says: "It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country should hold it void because the parties to the contract were the domiciled subjects of another country, where such a contract would not be allowed."

And later on the following passage occurs, which is specially applicable to this case:

"Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardship in consequence of those restrictions, their own nation must

bear the blame; but what right has one independent nation to call upon another nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right it must be found in the law of nations, that law 'to which all nations have consented, or to which they must be presumed to consent, for the common benefit and advantage.' Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now, the law of France is equally stringent, whether both parties are French or only one. Assume, then, that a French subject comes to England, and there marries, without consent, a subject of another foreign country, by the laws of which such a marriage would be valid, which law is to prevail? to which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not then be more ust, and therefore more for the interest of all, that the law of that country should prevail which both are assumed to know and to agree to be bound by? Again, assume, that one of the parties is English; would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? But it may be said that in the case now before the court both parties are French, and therefore no such difficulty could arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognised, it must be followed with all its consequences; the cases put are, therefore, a fair test as to the possibility of maintaining that by any *comitas* or *jus gentium* this court is bound to adopt the law of France as its guide."

This was the opinion of Sir C. CRESSWELL, Baron CHANNELL and Justice KEATING, constituting the full court which was at that time in the position of the Court of Appeal, and its decisions were only subject to review by the House of Lords. The Court of Appeal has, indeed, without alluding to the arguments of these very eminent judges, now overruled their opinion; but Lord Justice COTTON has expressed his concurrence in their views as far as is necessary for the purpose of the present case. He says: "No country is

bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England on the ground of any personal incapacity not recognised by the law of this country."

Numerous examples may be suggested of the injustice which might be worked to our own subjects if a marriage was declared invalid on the ground that it was forbidden by the law of the domicile of one of the parties. I select two. It is still the law in some of the United States that a marriage between a white person and a "person of color" is void. In some states the amount of color which will incapacitate is undetermined. In North Carolina all are prohibited who are descended from negro ancestors to the fourth generation inclusive, though an ancestor of each generation may have been a "white person." Suppose a woman domiciled in North Carolina, with such an amount of color in her blood as would arise from her great-grandmother being a negress, should marry in this country, should we be bound to hold that such a marriage was void? Or, suppose a priest or monk domiciled in a country where the marriage of such a person is forbidden were to come to this country and marry an English woman, could this court be called, at the instance of the husband, to declare that the marriage was null, and to give a legal sanction to his repudiation of his wife?

Mr. Disey, in his excellent treatise on "Domicile," p. 223, answers these questions in the negative, and places these two cases under this head: "A marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which, though imposed by the law of his or her domicile, is of a kind to which our courts refuse recognition." But on what principle are our courts to refuse recognition if not on the basis of our own laws? If this guide alone be not taken, it will be open to every judge to indulge his own feelings as to what prohibitions by foreign countries on the capacity to contract a marriage are reasonable. What have we to do, or, to be more correct, what have the English tribunals to do with what may be thought in other countries on such a subject? Reasons may exist elsewhere why colored people and white should not intermarry, or why first cousins should not intermarry, but what distinction can we properly draw between those cases? Why are they not both to be regarded in the same light here—namely, that as

they are legally permitted by our laws, we cannot recognise their prohibition by the laws of other countries as a reason why we should hold that such a marriage cannot be contracted here? Of the cases cited on the argument, the only one which I think it necessary to mention is that of *Mette* v. *Mette*, 1 Sw. & Tr., where Sir C. CRESSWELL held that a domiciled English subject should not marry his deceased wife's sister at the place of her domicile, although by the law of that place the marriage would be good. But Sir C. CRESSWELL had himself pointed out in *Simonin* v. *Mallac* the difference between controversies arising in the country where the marriage was celebrated and those arising elsewhere, and his judgment in that case showed that he considered that the law of the place of the celebration was to prevail.

Before concluding I wish to direct attention to the statute law on this subject of the marriage of first cousins. The statute of 32 of Henry VIII., c. 38, after reciting that the See of Rome had usurped the power of making that unlawful which by God's law was lawful, and the dispensation whereof they always reserved to themselves, as in kindred or affinity between cousins-german, and all because they would get money by it and keep a reputation for their usurped jurisdiction, enacts that every such marriage as within the Church of England shall be contracted between lawful persons, as by that act we declare all persons to be lawful that be not prohibited by God's law to marry, shall be valid. This statute, and all the marriage acts which have since been enacted, are general in their terms, and therefore appliable, and bind all people within the kingdom. In the weighty language of Lord MANSFIELD, "the law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there." *Hale* v. *Campbell*, Cowp. 208. Where is the enactment, or what is the principle of English law which engrafts on this statute the exception that it shall not apply to the marriage in England of cousins-german, who, by the law of another country, are prohibited from marrying without the dispensation of the Pope? And further, I would ask, what is the distinction between the prohibition of a marriage unless the consent of a parent be obtained, as in *Simonin* v. *Mallac*, and the prohibition of a marriage unless the dispensation of the Pope be granted, as in this case? And if there be a distinction, which I am unable to per-

ceive why is greater value to be attached by the tribunals of the country to the permission of the Pope than to that of a father?

For the reasons I have given, I hold that the marriage between the petitioner and the respondent was valid, and I dismiss the petition.

The decision of the Court of Appeal in this case (Law Rep. 3 Prob. Div. 1) would appear to favor the validity of a marriage between foreigners domiciled in their native country, though the marriage be contracted in England, where they were both temporarily resident; the marriage being in accordance with the law of their country, though inconsistent with the law in England or the *lex loci*. At least the case decided appears but the converse of the one suggested, and indeed, as far as British subjects are concerned, such rule appears to have been established in *Ruding* v. *Smith*, 2 Hagg. Consis. Rep. 382, yet not perhaps universally. Another important point underlies this judgment, viz.; one of the parties alone might retain the foreign domicile, though both might be foreigners; or one of them might be a British subject, whether domiciled at home or abroad. The former event has been already adjudicated upon, as we shall presently see. COTTON, L. J., in the course of his judgment, remarked, "It was pressed upon us in argument, that a decision in favor of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of domicile of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country, the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on, as an authority for setting aside a marriage between a foreigner and an English subject, domiciled in England, on the ground of any personal incapacity not recognised by the law of this country."

"The law of a country where a marriage is solemnized must alone decide all questions, relating to the *validity of the ceremony*, by which the marriage is alleged to have been constituted; but as in other contracts so in that of marriage, personal capacity must depend on the law of domicile." And yet we shall presently see that even the rule of "personal capacity or incapacity" has not been always acted upon; *Sussex Peerage Case*, 11 Cl. & F. 85. But further, Mr. Burge on Foreign and Colonial Law, vol. 1, pp. 184, 185, says: The courts of any country may decline to give to a marriage the full effect which it would have had, if conformable to their own law, and yet decline to declare that the parties have been living in concubinage. Wharton, after expressing an opinion that no American court would venture to declare a marriage void, because the formalities prescribed by the *lex loci* were not followed, in the case of persons marrying in their domicile of origin, with the intention of settling in the United States, says: "*A fortiori* must we repudiate the doctrine that the marriage abroad, of a domiciled citizen of the United States is void, unless it were solemnized with the formalities requisite in the place of solemnization:" Wharton on Evidence, vol. 1, § 83, 2 ed., to which is appended a note by the same author, thus: "Whether the courts of the

place of solemnization would hold valid such a marriage, is a question I do not propose to discuss in this place. It should be observed, however, that it by no means follows, that because the *judex loci contractus* would hold the marriage invalid, as to the subjects of his own state, he would hold it invalid when the parties are domiciled subjects of another state, which recognises consensual marriages as valid. On this topic, the student is referred to several articles in the Revue du Droit International, in one of which is given a ruling of the Tribunal de la Seine, that such marriages would not be held binding in France, *when one of the parties is a French subject*, resting the decision, therefore, on the duty due by a subject to his sovereign. And see Journal du Dr. Int. Priv. III. 182. Compare Mr. Lawrence's valuable monogram on this subject, disputing in some respects the conclusion above given, and his Commentaries sur le Droit International de Wheaton, III., p. 357. See Wharton's Confl. of Laws, sect. 173 *et seq.*

In the principal case both parties were foreigners, and both were alleged when the case was before the Court of Appeal, to be domiciled in Portugal, though married in England. The impediment was that of the consanguinity of first cousins, not being within the prohibited degrees of England, though forbidden in Portugal, except under a dispensation from the Pope, not demandable as a matter of right. Thus the parties may be said to have been incapable, at the time, of contracting a marriage between themselves in the country of their domicile. "Personal capacity," said COTTON, L. J., "must depend on the law of domicile."

Let us, for one moment, consider what the law of domicile involves, the very intricacy of which has led to a re-opening and re-hearing of the *Sottomayor Case*, and which, as we shall presently see, has resulted in further complications.

In *Undy* v. *Undy*, Law Rep. 1 Scotch & Div. Appeal 441, the following propositions were laid down:

Per Lord WESTBURY (Ex-Chancellor): "To suppose that for a change of domicile, there must be a change of natural allegiance, is to confound the political and civil status, and to destroy the distinction between *patria* and *domicilium*."

Per the Lord Chancellor: "A man may change his domicile as often as he pleases, but not his allegiance. *Exuere patriam* is beyond his power." Dictum of Lord KINGSDOWN, in *Moorhouse* v. *Lord*, 10 H. of L. Cases 272, qualified.

Per Lord WESTBURY again, "It is a settled principle that no man shall be without a domicile, and to secure this end, the law attributes to every individual, as soon as he is born, the domicile of his father if the child be legitimate; and the domicile of the mother if the child be illegitimate. This is called the domicile of origin and is involuntary. It is the creation of law, not of the party. It may be extinguished by act of law, as for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party. Domicile of choice is the creation of the party. When a domicile of choice is acquired, the domicile of origin is in abeyance, but is not absolutely extinguished or obliterated. When a domicile of choice is abandoned the domicile of origin revives; a special intention to revert to it being unnecessary."

Per Lord CHELMSFORD: "Story says that the moment a foreign domicile is abandoned, the native domicile is re-acquired. The word 're-acquired' is an inaccurate expression. The meaning is, that the abandonment of an acquired domicile, *ipso facto*, restores the domicile of origin. If after having acquired a domicile of choice, a man abandons it, and travels in search of another domicile

of choice, the domicile of origin comes instantly into action and continues until a second domicile of choice has been acquired."

Per Lord WESTBURY: "A natural-born Englishman may domicile himself in Holland; but if he breaks up his establishment there and quits Holland, declaring that he will not return, it is absurd to suppose that his Dutch domicile clings to him until he has set up his tabernacle elsewhere."

Per Lord CAIRNS, in *Bell* v. *Kennedy*, Law Rep. 3 H. L. 307: "With regard to domicile of birth, the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired."

Per Lord CURRIEHILL, in *Donaldson* v. *McClure*, 20 D. 307 (cited Guthrie's Savigny, p. 61): "The animus to abandon one domicile for another imports an intention not only to relinquish those particular rights, privileges and immunities which the law and constitution of the domicile confers, in the domestic relations, in purchases and sales, and other business transactions, in political or municipal status, and in the daily affairs of common life, but also the laws by which *succession to property is regulated after death*. The abandonment or change of domicile is, therefore, a proceeding of a very serious nature, and an intention to make such a change requires to be proved by very satisfactory evidence."

Though, as we have seen it enunciated in *Undy* v. *Undy*, a change of domicile does not necessarily imply a change of allegiance, there is at least one exception to that proposition, viz., in the case of a woman marrying a man owing a foreign allegiance. In the case of a woman, a British subject, marrying a foreigner, she not only acquires his domicile, but becomes, *ipso facto*, naturalized in his country (7 & 8 Vict. c. 66, s. 16). See also Forsyth's Cases on Constitutional Law p. 329.

Regard to the law of domicile, involves an acquaintance with that law, and this further involves an investigation of the specific domicile of the contracting parties, or at least of one of them.

The domicile of origin may have been superseded by an acquired one, more than once, and the domicile of origin may have been restored, *ipso facto*, by the subsequent abandonment of the acquired one. To ascertain the true domicile of a person of roving habits, at the time of his marriage, might lead, and, as in the *Sottomayor Case*, has led to many perplexities. The question is partly of nationality, and partly of domicile, original or acquired.

The judgment on appeal, in *Sottomayor* v. *De Barros*, has, however, solemnly decided that the *lex domicilii* supersedes the *lex loci contractus*, at least in judging of personal capacity, and until this case is overruled it must be accepted as an authority. We proceed to consider the converse of the proposition that a marriage, illegal by the *lex domicilii*, must be held illegal by the *lex loci*. It is said this only relates to an absolute personal incapacity, in the contracting parties, amounting to a prohibition, but where such personal incapacity might be removed by a Papal dispensation it can scarcely be deemed absolute. Indeed, in *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, where the incapacity might have been removed by the consent of parents, or by not being impeached within a given time, such incapacity was not considered an absolute one. So, in the principal case, though solemnized without the Papal dispensation, the marriage was but voidable, not void, and could, according to the canon law of Rome itself, only be impeached during the lives of the parties to it.

We now come to consider the converse of the above proposition, viz., whether, and how far a marriage legal according to the *lex domicilii*, the parties to it laboring under no personal incapacity, but failing to comply with the ceremonial requirements of the *lex loci*, will be recog-

nised in the country of the *lex loci contractus*. Let us take the case of a consensual marriage *per verba de præsenti*, perfectly legal if effected in the country of the *lex domicilii*, but yet contracted in the country of the *lex loci* where the celebration of such marriages cannot be enforced by any court. Take, for instance, England, bearing in mind the words of COTTON, L. J., in *Sottomayor* v. *De Barros*, that "the law of a country, where a marriage is solemnized, must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted, but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit *its subjects*, &c., 'from contracting marriage,' &c., this, in our opinion, imposes on the *subjects* of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage, *subjects of and domiciled* in the country which imposes this restriction, wherever such marriage may have been solemnized." Why then should not these same two ingredients, *nationality* and *domicile*, be considered as essential ingredients in judging of the validity of a marriage according to the *lex domicilii*, though not celebrated according to the ceremonial required by the *lex loci*?

As was said by Lord BROUGHAM, in *Warrender* v. *Warrender*, 2 Cl. & F. 488, "the question always must be, did the parties *intend* to contract marriage?" It is true, his lordship proceeds to add, "the laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the *intention* to enter into the contract." This is in accord with the opinion of the Court of Appeal in *Sottomayor* v. *De Barros*, and, granting this to be the prevailing doctrine, the question still remains whether a form of marriage never expressly forbidden or extinguished, even by the English Marriage Act, and still recognised in many parts of Christendom, as based upon the universal common law of Europe from the earliest ages of Christianity, can fail of recognition by the *lex loci*, for want of the mode of celebration enjoined by its municipal law, although perfectly legal if contracted in the country of the *lex domicilii*.

It should be remembered that the ceremony required by any municipal law is but evidence of the *intent*, and as far as relates to the subjects of the state enacting such requirements may be the only evidence allowed of such intent. The object is, to use the words of Lord BROUGHAM in the case just cited, "the ascertaining the validity of the contract, and the meaning of the parties, that is the existence of the contract and its construction." The contract, for want of compliance with certain forms, may be deficient in incidents in the *locus contractus*, as, for instance, dower; and especially, dower *ad ostium ecclesiæ* may not, and indeed never could attach to any marriage not solemnized *in facie ecclesiæ*. It would be a contradiction in terms if it could. But yet the marriage might be valid and the children legitimate: Bracton (A. D. 1235). From the time of Bracton to Lord STOWELL, the latter of whom lived and acted judicially long after the passage of the Marriage Act, numerous authorities evidence that consensual marriages were deemed valid, although certain incidents might not attach to them, and the neglect of the religious ceremony may have rendered the parties liable to ecclesiastical censure: 4 Brac., *De actione Dotis* 302 b; Viner's Abr., tit. *Marriage*, F.; Co. Litt. 34 a; Reeve's History of the Common Law, under the head of "*Espousals*;" Blackst. Com., c. 15, p. 432.

Speaking of the laws of each nation annexing certain disqualifications or imposing certain conditions precedent on certain

parties, Lord BROUGHAM, in *Warrender* v. *Warrender*, *supra*, says, "this falls exactly within the same rule;" but he adds, "the English jurisprudence, while it adopts the principle in words, would not, perhaps, in certain cases which may be put, be found very willing to act upon it throughout. Thus, we should expect that the Spanish and Portuguese courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under Papal dispensation, because it would clearly be avoidable in this country. But I strongly incline to think that our courts would refuse to sanction a marriage between those relatives, contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country." Why, it may be asked, should a foreign nation be expected to respect the law of England without requiring a corresponding respect to their law on the part of England? Upon what international ground has England a right to expect that, in the first case put by Lord BROUGHAM, her *lex loci* would be respected by the foreign nation, and in the second case that her *lex domicilii* should prevail against the foreign *lex loci*, without some reciprocal concession on the part of England? His lordship seems to be fully alive to the inconsistency; yet the *Sottomayor Case* confirms his view of the English jurisprudence. We must not, however, confound *incidents* with *essence*. The essence of the contract is the intention. The incidents are "the rights under it, flowing from and arising out of it, parcel of the contract." The former is to be judged of by the *lex loci*, the latter, to use Lord BROUGHAM'S own words, "must be dealt with by the courts of the country where the parties reside and where the contract is to be carried into execution:" *Warrender* v. *Warrender*, *supra*.

In the principal case, the Court of Appeal has decided that there was no valid contract entered into the country of the *lex loci*, because such a marriage was prohibited by the *lex domicilii* of the parties, and this although the laws of the *locus contractus* were strictly complied with. *A fortiori* should a marriage contract be deemed valid if sanctioned by the *lex domicilii*, and not prohibited by the *lex loci*, though celebrated without the required forms or conditions precedent, but for want of which certain incidents may not attach to such a marriage to the full extent of the enjoyment of the rights of dower, courtesy, or the like, in the country of the *lex loci contractus*.

Premising that the Canon law or common law relating to marriage once prevailed in England, as it does still in many parts of the United States of America, and that, as Lord HOLT says, in *Wigmore's Case*, 2 Salk. 438, "By the Canon law, a contract *per verba de præsenti*, is a marriage, as I take you to be my wife;" and that "nothing can be more improbable than the existence of one law for all Christian Europe, and another for England" (Lord BROUGHAM, in *The Queen* v. *Millis*, *infra*); or, to put the case even stronger, in the language of Lord CAMPBELL, in the same case, "There is not a trace in any ecclesiastical writer of the law of marriage in England being different from the law of marriage in other Christian countries;" referring, in addition, to the high authority of Lord STOWELL, who says, in his remarks in *Lindo* v. *Belisario*, 1 Hagg. Cons. Rep. 229, marriage "is a contract according to the law of nature, antecedent to any civil institution, and which may take place to all intents and purposes, whenever two persons of different sexes engage, by mutual consent, to live together. * * * In most countries it is also clothed with religious rites, even in rude societies. Yet, in many of these societies, they may be irregular, informal, and discountenanced, yet not invali-

dated;" it may well be asked does the canon law, which, according to Lord STOWELL, bound the former ecclesiastical courts, also bind the present court for matrimonial causes? That it does to some extent, there is no doubt (20 & 21 Vict. c. 85, s. 22); but what is the effect of it, and to what extent do its principles operate? The solution of these questions involves subjects of vast social importance.

In *The Queen* v. *Millis*, 10 Cl. & Fin. 841, decided by the House of Lords, March 1844, Lord Chief Justice TINDAL, in delivering the opinion of the judges to the lords, said, speaking of consensual marriages or marriages *per verba de præsenti*, "The only clause in Lord HARDWICKE'S Act that affects these contracts is the 13th, which enacts only that no suit or proceeding shall be had in any ecclesiastical court in order to compel celebration. These contracts, therefore, are still *lawful*, though they cannot be enforced in any ecclesiastical court."

Mr. Jacob, also a great authority, in his 2d edition of "Roper on Husband and Wife," says, the Marriage Act "does not nullify contracts *de præsenti*, or declare that they shall not be *deemed marriages*." The question before the house was, whether such a marriage was sufficient to support an indictment for biganiy in Ireland, and this being a crimianl case the decision rested upon the well-known rule of "*semper præsumitur pro negante*."

Before Lord HARDWICKE'S Act, 26 Geo. II., c. 33, unquestionably such contracts were deemed *verum matrimonium*, as was admitted by Lords BROUGHAM, CAMPBELL, DENMAN, LYNDHURST, COTTENHAM and ABINGER. Indeed the house was equally divided in opinion as to whether such a marriage was not sufficient to support the indictment in question. Since then, however, viz., on 9th August 1844, the 7 & 8 Vict. c. 81, s. 49, was passed, enacting, or rather directing, that the rules prescribed by the rubrics shall continue to be observed by every person in holy orders of the United Church of England and Ireland who shall solemnize any marriage in Ireland, &c.

This was deemed necessary because Lord HARDWICKE'S Act did not extend to Ireland, although a clause similar and in fact identical to the 13th in the English Act was imported into the Irish Act, 58 Geo. III., c. 81 (A. D. 1818), but yet there was, up to that time, no statute in Ireland requiring marriages to be solemnized in a church, neither were banns or license requisite. In point of fact, although the evidence of marriage *de facto per verba de præsenti* is no longer receivable in courts of justice, whether in England or Ireland, where such marriages have taken place in either of those countries, at least between British subjects, yet whatever recognition they received prior to 7 & 8 Vict. c. 81, they still retain, no nullifying clause having ever been inserted in any statute relating to Ireland. But the question we now desire to raise is whether such a contract entered into in England between, for instance, a domiciled citizen of the United States and an English subject (the latter being the woman), confers upon the female the domicile of an American citizen. If the contract be that of marriage it undoubtedly does: Dig. 50, I. 37; Code xii. I. 13; X.; 40, 9. But then does this doctrine apply to marriages *de facto* as well as to marriages *de jure*? If marriages *per verba de præsenti* be still accounted marriages, even in England, though they cannot be enforced in any ecclesiastical court, and cannot be evidenced in a court of justice, do they, nevertheless, in the case of the husband being a foreigner, confer his domicile upon his wife? In other words, does such a contract evidence the intention of the parties to contract an alliance in accordance with the law of the man's foreign domicile where such a marriage is not only recognised, but evidenced by the words *de præsenti*.

Where there is an absolute prohibition not removable in the country of the domicile of origin, the *lex domicilii* creating the incapacity might well be allowed to prevail even in a foreign country. In the *Sussex Peerage Case*, 11 Cl. & F. 85, the evidence given by Dr., afterwards Cardinal Wiseman, before the House of Lords, was to the effect that a marriage at Rome of British subjects, rendered incapable by British law of contracting marriage between themselves, *anywhere*, without a certain consent, or upon the refusal of such consent, without adopting further proceedings, as directed by the English Royal Marriage Act (12 Geo. III., c. 11), was nevertheless valid at Rome itself, though not celebrated in accordance with the decree of the Council of Trent, the parties being Protestants, and therefore not amenable to the decrees of that Council, and the English Marriage Act or the special law of their domicile under that act having no force or effect in Rome. This, however, was scarcely an absolute prohibition, and as in the case of *Simonin* v. *Mallac*, resulted in the unseemly conflict of a marriage, valid in the country of the *lex loci*, being held invalid in the country of domicile. Lord CAMPBELL'S view of the Roman Catholic doctrine is thus corroborated by the *Sussex Peerage Case*. Such in fact is based upon the universal common law of Christendom. If, however, the validity or invalidity of the marriage in a foreign country, is to depend upon the *lex domicilii* of the parties, as decided by the English Court of Appeal in *Sottomayor* v. *DeBarros*, even in a case where an impediment is removable under certain circumstances, and that therefore a marriage, invalid according to the *lex domicilii* of a foreign country, where the parties to the contract are still domiciled, is to be held invalid in the country of the *lex loci contractus*, would the converse hold good, viz., would a marriage valid in the country of domicile, be held valid in the country of the *lex loci*, although the ceremonial requirements of the *lex loci contractus* had not been complied with? In other words, would a marriage of two foreigners, still retaining their domicile of origin in a country where a perfect and valid marriage may be contracted *per verba de præsenti* alone, be deemed valid, if so contracted in a country where such a marriage is not recognised *de jure*, although it may not have been absolutely destroyed *de facto*? Then follows the further question, Whether, both parties being foreigners, but only one of them retaining his foreign domicile, such a marriage so contracted, can be recognised by the country of the *lex loci*? And further, whether only one of the parties, the man, being a foreigner and having a foreign domicile, the *lex domicilii* can thus be imported into the country of the *lex loci*, upon the acknowledged principle of the husband conferring his domicile upon the wife? If the country of the *lex loci* repudiates the *modus contractus* of the foreign domicile, is it still within the *jus gentium* for the country of the foreign domicile to give effect to the marriage notwithstanding? The comity of nations would seem to imply a mutual recognition or mutual repudiation and not a perpetual conflict of laws. Referring to the case of *The Queen* v. *Millis*, 10 Cl. & F. 875, Mr. Tyler, in his work on the Law of Coverture, under the head of Institution of Marriage, says, "The question was not *definitively* settled whether a marriage *per verba de præsenti* 'by words of the present time,' in the presence of witnesses only, is a valid marriage under the English laws:" p. 816.

Such at all events appears to be the American law. The authority just cited, Mr. Tyler, says, in sect. 652 of the above-named work: "In most of the states, the marriage is held to be valid and binding, notwithstanding it is entered into with no rites or ceremonies: *Clark* v. *Clark*, 10 N. H. 383. And a valid marriage may exist without any

formal solemnization: *Clayton* v. *Wardell*, 4 N. Y. 230." And we might add to this, a decision of the Supreme Court of the United States, April 29th 1878, that the statutes of any state providing for the presence of a minister or magistrate at the solemnization of marriage, do not render a marriage at common law invalid for non-conformity, unless there are express words of nullity in the statute. This case was that of an Indian girl by declaration and cohabitation with a citizen of the United States. See *Meister* v. *Moore*, 6 Otto 76. Statutes must contain express words of nullity, otherwise they are treated as directory only. "The courts hold," says Mr. Tyler, again, "that such statutes are intended to be directory only upon ministers and magistrates, and to prevent as far as possible, by penalties upon them, the solemnization of marriages, when the prescribed conditions and formalities have not been fulfilled: *Parton* v. *Hervey*, 1 Gray 119. In the language of PARSONS, C. J., "When a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without the consent of the parents or guardians, such marriage would undoubtedly be lawful, although the officer would incur the penalty for a breach of duty:" *Milford* v. *Worcester*, 7 Mass. 48, 54, 55. In Maine, North Carolina and Tennessee, a contrary doctrine has been held, and Mr. Tyler adds: "The weight of authority is in favor of the rule, that in the absence of any provision of law declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, all marriages regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute. This is the general doctrine of the courts, both in this country and in England:" *Parton* v. *Hervey*, 1 Gray 119; *Milford* v. *Worcester*, 7 Mass. 48; *Londonderry* v. *Chester*, 2 N. H. 268; *Hantz* v. *Sealey*, 6 Binn. 405; *The King* v. *Birmingham*, 8 B. & Cr. 29; *Cattrell* v. *Sweatman*, 1 Rob. 304; Id. sect. 652.

The point for which we are contending is that even though a marriage may not be a marriage *de jure* it may, nevertheless, be one *de facto*: the legal incidents, such as dower, &c., may not attach in the *locus contractus* to such a marriage, for want of compliance with the *lex loci*, but can it be said to be absolutely void? Although in *Catherwood* v. *Caslon*, 13 M. & W. 264, where the parties, both being English and members of the Church of England, were married in Syria, not according to the *lex loci* (Syria being a Mahommedan country), but according to the rites of the Church of England and at the British consulate at Beyrout by an American Methodist minister, the marriage was held not sufficiently proved, this was because the *lex domicilii* was not complied with, a Methodist minister not being a person in Holy Orders according to the English view, as required by the *lex domicilii*, such designation pertaining only to the clergy of the Church of England or to Roman Catholic priests: *Scrimshire* v. *Scrimshire*, 2 Hag. R. 395. PARKE, B., however, in this very case said, "It may be proper to advert to a dictum in Buller's Nisi Prius 28, that a marriage according to any form of religion is a marriage *de facto*; and for this the case of *Woolston* v. *Scott*, before DENNISON, J., in 1753, is quoted." This case of *Catherwood* v. *Caslon*, however, was neither in accordance with the *lex loci* nor the *lex domicilii*. It is conceded that the civil consequences or incidents may not attach in England to a mere marriage *de facto* at the present day, but the contention is that as between persons domiciled in a country where *de præsenti* marriages are still recognised the contract, though entered into abroad, to be fulfilled at home, is a valid contract and *de facto* marriage.

Referring to Lord BROUGHAM'S ob-

servations in *Warrender* v. *Warrender*, in the House of Lords, he puts a case of the *lex domicilii* prevailing over the *lex loci contractus*, and that too, where there was no absolute prohibition by the *lex loci contractus*, the impediment having been already removed by a Papal dispensation, and thus the *lex loci* satisfied. In England, such a marriage, viz., one within the prohibited degrees, would be absolutely void under a special statute nullifying it in so many words. But with regard to a marriage *per verba de præsenti*, not absolutely prohibited, there is no ground of avoidance. It is based upon more than the canon law itself. It is simply irregular and deficient in the incidents which are creatures of the municipal law. Bracton (temp. Henry III., A. D. 1235), Book 4, *De actione Dotis*, 302 b, draws a distinction between a legitimate and clandestine marriage. The marriage in *facie ecclesiæ* conferred the right of dower *ad ostium ecclesiæ*, but a marriage *per verba de præsenti* was sufficient for the succession to property by the issue. "Dower *ad ostium ecclesiæ*," says D'Anvers, the translator of Rolle's Abridgment, "is better for the wife than dower at common law." D'Anvers's Rolle's Abr. 665. The reason given is that dower *ad ostium ecclesiæ* being declared and the quantity openly set out at the entrance of the church itself, with the priest as a witness, required no other assignment: I. Inst. 34; Lit. sect. 39.

Dower, at common law, would attach to a common-law marriage, and dower *ad ostium ecclesiæ* to a marriage *in facie ecclesiæ*, the latter, however, taking the precedence where the common-law marriage remained unsolemnized *in facie ecclesiæ*.

The natural law may be said to be the prevailing law of Christendom in the absence of any local legislation to the contrary. Indeed, it may be said to be the prevailing law of the world in the absence of such municipal legislation. Such local and municipal legislation must therefore be very precise and definite to destroy, even locally, such a natural law, and no legislation in England has ventured to do more than enact that no suit shall be instituted in any ecclesiastical court to compel celebration of such a marriage, and even Lord HARDWICKE'S Marriage Act has since been much modified by the 4 Geo. IV., c. 76: "By the law of England, as it existed at the time of the passing of the Marriage Act, a contract of marriage *per verba de præsenti* was a contract indissoluble between the parties themselves, affording to either of the consenting parties, by application to the Spiritual Court, the power of compelling the solemnization of an actual marriage." Such was the unanimous opinion of the judges, as expressed by TINDAL, C. J., in the case of *The Queen* v. *Millis*, in the House of Lords. This power to compel a solemnization *in facie ecclesiæ* was destroyed by the clause in the Marriage Act before mentioned, but that clause did not declare that such a contract should not be deemed a marriage. In *Wigmore's Case*, 2 Salk. 438, Lord HOLT said, in speaking of marriages *per verba de præsenti*, says, "By the law of nature such contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes this marriage irregular, and not expressly void; but marriages ought to be solemnized according to the rites of the Church of England to entitle them to the privileges attending legal marriage, as dower, thirds," &c.

The great difference, or rather distinction, that always was recognised by the common law was that whilst the subsistence of a regular marriage *in facie ecclesiæ* rendered a subsequent marriage *void*, that of an irregular marriage or one *per verba de præsenti* only rendered it *voidable*. The temporal courts took no notice of a marriage *per verba de præsenti*. Thus if A. married B. by verbal contract, and afterwards married C. in face of the church, they held the second marriage

good. But if B. compelled A. to celebrate the first marriage *in facie ecclesiæ*, the temporal courts would immediately adopt the first marriage, which they had previously repudiated, and reject the second marriage, which they had previously recognised. It was to remedy this apparent incongruity that the clause to which we have adverted was inserted in the Marriage Act. Up to the passing of this act the consent of the contracting parties was deemed everything to constitute a binding union, the solemnities of religion being merely adjuncts, proper to be observed, but not indispensable. The temporal courts paid a deference to the requirements of the spiritual courts in this respect.

In *The Queen* v. *Millis*, Lord CAMPBELL said, as has been before mentioned, "According to the doctrine of the Roman Catholic Church no religious ceremony was or is necessary to the constitution of a valid marriage. Although marriage is considered a sacrament, this sacrament, like baptism, might be administered under certain circumstances without the intervention of a priest," &c. Now if this be the doctrine of the oldest of Christian churches, which once dictated the universal law of Christendom in such matters, and if, as Lord CAMPBELL adds, "there is not a trace in any ecclesiastical writer of the law of marriage in England being different from the law of marriage in other Christian countries," we can understand why the English legislature has hesitated to declare marriages *per verba de præsenti* to be invalid, but has simply declared them incapable of compulsory celebration by any ecclesiastical or, as now substituted, matrimonial court. The domicile of the husband might, nevertheless, be acquired by the wife although the celebration of the marriage itself could not be enforced by any ecclesiastical court. The Marriage Act does not say that the temporal courts shall not give effect to the acquired domicile. If, then, the acquired foreign domicile be acknowledged it can only be in right of the husband, the law of whose domicile must determine, not so much the validity of the marriage, as his right to contract it with or without certain solemnities or ceremonies.

In the case of *Procter* v. *Procter*, 2 Hagg. Cons. Rep. 292–301, Lord STOWELL said, "It is notorious that this country, at the Reformation, adopted almost the whole of the law of matrimony, together with all its doctrines of the indissolubility of contracts *per verba de præsenti et per verba de futuro*, of separation *a mensa et thoro*, and many others; the whole of the matrimonial law is, in matter and form, constructed upon it." In the Roman Catholic Church, notwithstanding some decrees of the Fourth Council of the Lateran (tem. Pope Innocent III.), for the regulation of marriages, a clandestine union only subjected the rebellious couple to the terrors of ecclesiastical censure, and in the case of a consensual marriage they could, under pain of excommunication, be compelled to proceed to a public celebration of the nuptials. The subsequent decree of the Council of Trent, requiring the presence of a priest at the nuptials, is not imperative upon any country (even Catholic) that declines to adopt it, and without such adoption such a clandestine or irregular marriage would be deemed valid. Such a marriage was in fact complete in substance, but deficient in ceremony: Poynter on Marriage and Divorce 15. It is unnecessary to add that the decrees of the Council of Trent were never received in England. The principles of the common law, based upon the canon law of Christendom, are few and simple. In fact, until the time of Pope Innocent III., who died in 1216, there never had been any religious solemnization of marriage. "The solemnization of marriage was not used in the church before an ordinance of Innocent III., before which the man came to the house where the woman inhabited and carried her with

him to his house, and this was all the ceremony:" Viner's Abr., tit. *Marriage*, F. See also *Canjolle* v. *Ferrie*, 26 Barb. 117, 184, 185; s. c. 23 N. Y. 90.

For a final definition of a contract or espousals *per verba de præsenti*, Lord LYNDHURST, in *Regina* v. *Millis*, 10 Cl. & Fin. 534, pronounced the following: "A contract of espousals *de præsenti* was indissoluble; the parties could not by mutual consent release each other from the obligation. Either party might by a suit in the ecclesiastical courts, compel the other to recognise the marriage *in facie ecclesiæ*. The contract was considered to be of the *essence* of matrimony, and was therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matrimonium*. If either party afterwards married with another person, solemnizing the same *in facie ecclesiæ*, such marriage might be set aside, even after cohabitation and the birth of children, and the parties compelled to celebrate the first marriage *in facie ecclesiæ*."

Now the 13th clause in Lord HARDWICKE'S Act merely enacts, that for the future no suit shall be brought in any ecclesiastical court to compel celebration. The marriage *de facto*, the contract, "the essence of matrimony," to use Lord LYNDHURST'S words, remained intact. Now the rights under this contract and "all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the courts of the country where the parties reside and where the contract is to be carried into execution." Lord BROUGHAM, in *Warrender* v. *Warrender*, 2 Cl. & Fin. 488. His lordship is evidently referring to the *lex domicilii* of the parties.

If the judgment of the Court of Appeal in *Sottomayor* v. *De Barros* be correct, and should it be confirmed by any further appeal from the decision of Sir JAMES HANNEN under the modified state of facts, as found by him, *supra*, then the domicile of the parties, or one of them, and that one being the man, must determine the validity of the marriage, where the law of the country of the domicile differs from the law of the *locus contractus*, and that not only where the difference consists of an absolute prohibition, but even of a removable impediment; and thus the converse of the proposition that a marriage invalid in the country of the domicile is likewise invalid in the *locus contractus*, even though celebrated there with all legal solemnities, would appear to hold good, viz., that a marriage valid according to the law of the country of domicile is valid when celebrated in the *locus contractus*, though otherwise not recognisable by the *lex loci contractus*. If this be so, *a fortiori* a form of marriage, once of universal acknowledgment, though no longer recognised, yet, never formally destroyed, in one country, must be acknowledged, if such be still the *lex domicilii*, though contracted in the country of the *lex loci*. It might be added that though the English statute forbids any suit to be instituted to compel celebration *in facie ecclesiæ* of a contract *per verba de præsenti*, there is no statute which takes away the power to submit to such celebration. If another marriage had intervened between the contract and its celebration it might still, perhaps, be asked, which is really the prior marriage? Is the first marriage, having subsequently been solemnized, to date from the original contract *per verba de præsenti*? *The Queen* v. *Millis*, can scarcely be said to have decided these points.

The case of *The Queen* v. *Millis*, merely decided that a marriage *per verba de præsenti*, without the intervention of a person in Holy Orders, was not such a marriage as would support an indictment for bigamy. The same may be said, we believe, of a marriage in that part of the United States where marriages by repute and celebration are recognised. An actual formal marriage must in such case be proved, not a mere inferential one:

*Patterson* v. *Gaines*, 6 How. U. S. 550. It was even alleged in *Queen* v. *Millis*, that a marriage *per verba de præsenti* was not proved, as, according to that case, to constitute such a marriage in England or Ireland, the presence of a person in Holy Orders had always been deemed necessary. But this was admitted to be a requirement under some local Saxon canons, of King Edmund (A. D. 940). How any Saxon canons enacted one hundred and twenty-six years before the Norman Conquest of England, could affect Ireland, then not under the dominion of England, remained unexplained in the judgment. Such local canons, however, could have no effect upon the general law of Christendom. Such Saxon canons were truly only the king's ecclesiastical law, binding on his subjects alone. See observations of Lord LYNDHURST, Chancellor, *In re Millis*, also of Chief Justice TINDAL, in same case.

The sole question now before us is, Is the law of domicile to take precedence of the law of the place of contract? If so, and the presence of a priest not being required by the *lex domicilii*, nor yet by the ancient canon or common law *cadet quæstio* of the English local requirement in that respect. We have seen that the *lex domicilii* is preferred not only in the case of an absolute prohibition *domicilii*, but even in a qualified one, at least such must be assumed unless the decision of the Court of Appeal in *Sottomayor* v. *De Barros*, should be overruled, and the views indicated in the foregoing opinion of Sir JAMES HANNEN be finally adopted. If such be so in *annulling* a marriage, upon the ground that it is forbidden by the *lex domicilii*, does the converse hold good, that the *lex domicilii* should prevail in *affirming* a marriage not celebrated in accordance with the *lex loci contractus*? We think it is even an *a fortiori* case, the man's domicile governing the case, the wife invariably taking the domicile of the husband.

Many of the difficulties which have arisen, in construing a contract of marriage may, perhaps, be traceable to a disregard of the two-fold character of this institution. Marriage is not merely a contract, but a *status* likewise. Sir JAMES HANNEN says in delivering his opinion, *supra*: "In truth, very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a *status* arising out of a contract to which each country is entitled to attach its own conditions, both as to creation and duration." In the case we have been submitting the contract may well have taken place in one country, where at all events such a contract is not prohibited, and the *status* arising out of such contract, with all its incidents, be subjected to the conditions which each country may respectively attach thereto, even to the extent of withholding recognition by the *locus contractus* through a neglect of its ceremonial requirements, and yet the marriage, *qua* marriage, may not be invalid.

HUGH WEIGHTMAN.

New York.

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## *High Court of Justice. Court of Appeal.*

### DREW *v.* NUNN.

The lunacy of a principal, if so great as to render him incapable of contracting for himself, puts an end to an authority to contract for him, previously given to his agent.

Where a principal holds out an agent as having authority to contract for him, and afterwards becomes lunatic, he is liable on contracts made by the agent after the lunacy, with a person to whom the authority has been so held out, and who had no notice of the lunacy.